

# *The Next Chapter of ‘Wrongful Life’: Concepts for ‘Wrongful Survival’ in Comparative Analysis*

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## ABSTRACT

This article revisits the controversial concept of ‘wrongful life’ in comparative analysis of English and German law. In a recent decision, the German Federal Court of Justice dealt with the question of whether damages can be awarded for pain suffered because of an unnecessarily prolonged life. This novel case challenges the doctrines that courts on “both sides of the channel” have developed in previous cases of ‘wrongful life’. The article discusses the development of English and German law with regard to cases of ‘wrongful life’ in order to find a conceptually coherent solution to the issue new issue of ‘wrongful survival’.

## I. INTRODUCTION

Questions of law are, in modern times, rarely a question of life and death. Sometimes, however, questions of life and death can become questions of law. Whenever that is the case, courts have to strike a balance between fundamental questions of morality on the one hand and basic concepts of private and especially tort law on the other hand. Consequently, these cases have always challenged the way we think about tort law. In a recent decision, the German Federal Court of Justice (*Bundesgerichtshof*, hereafter BGH)<sup>1</sup> had to decide on a claim brought against a doctor who in the view of the claimants unnecessarily prolonged the life of their father and therefore caused him to suffer. While the BGH dismissed the

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<sup>1</sup> The BGH is the highest civil court in Germany.

case, important conceptual questions are still to be answered. In this regard, such cases of 'wrongful survival' further challenge our understanding of tort law. This challenge, however, is not entirely new. Cases of 'wrongful life' have been discussed in both English and German law for over 40 years and can provide important guidance with regard to 'wrongful survival'.

Until recently, these cases always concerned the unwanted or 'wrongful' birth of a child. Courts had to decide on claims based on the birth of a child who, in the eyes of the parents or the child itself, should never have been born. These cases have to be the starting point of any discussion regarding the novel cases of 'wrongful survival'. I argue that the way English and German courts have dealt with the claim of the child shows that courts in these two jurisdictions share a common set of values and legal principles.

Subsequently, I argue that English and German courts have left their common ground when dealing with the claims of the parents. While English courts have started to award damages for 'loss of autonomy', German courts also award damages but based on economic loss. With regard to English law, the question raised by these developments is how 'loss of autonomy' fits into the existing landscape of English tort law. I argue that acknowledging loss of autonomy as a regular head of damage, as suggested by academic writers, is not supported by case law and does not fit into the structure of English tort law. I further argue that English law should instead acknowledge a new intentional tort, protecting important parts of human autonomy, that is actionable *per se*. Financial support for the parents, for which there is a strong case from a policy perspective, should instead be provided by a statutory provision, in order to keep questions of legal and social policy apart.

These findings provide guidance when deciding on 'wrongful survival'. While these cases do not concern the beginning of a human life but rather the end of one, the core problems remain the same. I argue that English courts, when presented with a case of "wrongful survival", should apply the proposed intentional tort.

## II. A NOTE ON TERMINOLOGY

A specific issue when discussing these cases, especially in comparative analysis, is one of terminology. To distinguish the three cases mentioned so far, I will use the following terminology. The first group, regarding the claims of a child after birth, will be discussed as cases of 'wrongful life'. The second group of cases, regarding the corresponding claims of the parents, will be called 'wrongful

conception'.<sup>2</sup> The last group of cases will be called 'wrongful survival'. I use the term 'wrongful existence' as a collective term for all three groups of cases.

### III. WRONGFUL LIFE

#### A. ENGLAND AND WALES

This issue of wrongful life reached English courts in 1982 in the case of *McKay v Essex AHA* (hereafter, *McKay*).<sup>3</sup> In this case, an infant was born with severe disabilities caused by an infection of rubella (German measles) suffered by the mother during the pregnancy. A doctor negligently failed to diagnose the mother's illness during her pregnancy. Had the mother known that she suffered from rubella, she would have terminated the pregnancy. The child brought a claim for damages against the doctor for suffering a life with disabilities. The Court of Appeal unanimously held that there was no cause of action to claim damages for wrongful life.

This decision was based on two main arguments. Firstly, the court held that there is no common law duty owed to the foetus to terminate a pregnancy.<sup>4</sup> Both the statutes on the termination of pregnancies (namely the Abortion Act 1967 and the Infant Life Act 1929) and public policy led the court to this conclusion. Stephenson LJ held that such a duty ran contrary to Section 5(1) of the Abortion Act 1967 and would constitute a violation of the 'sanctity of human life', as the life of an affected foetus would be regarded as being "so much less valuable [than the life of a child without disabilities] that it was not worth preserving".<sup>5</sup> This argument is an interesting example of how the focus on the concept of 'duty' in English tort law can in some cases provide a grip on the issue at hand. In this case, the concept of duty provides an entrance door for other legal rules, allowing the court to integrate the law on abortion into tort law.

Secondly, the court held that damages could not be assessed by a court in this case and therefore could not be awarded.<sup>6</sup> This argument arose because the disability itself was not caused by the doctor. The injury caused could therefore only be the fact that the claimant was alive. Presented with this injury, the court

<sup>2</sup> This terminology is not entirely precise. The group "wrongful conception" also includes cases in which a doctor negligently fails to provide information that would have led to an abortion. In these cases, it is not the conception that is wrongful cf *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) [99] (Lord Clyde). However, there is no legal distinction pertaining to this terminological difference and thus I will use the term wrongful conception for both sub-groups.

<sup>3</sup> *McKay v Essex AHA* [1982] QB 1166 (CA).

<sup>4</sup> *ibid* [1180].

<sup>5</sup> *ibid*. The argument was also supported by Ackner LJ at [1188].

<sup>6</sup> *ibid* [1182].

held that it would have to assess the value of non-existence to examine the damage, and it found itself unable to do so. Ackner LJ asked, “[b]ut how can a court begin to evaluate non-existence, ‘the undiscovered country from whose bourn no traveller returns?’”.<sup>7</sup> This argument presents a key issue in cases of ‘wrongful existence’. It is not surprising that the court turned to Shakespeare<sup>8</sup> to verbalize the question that it ultimately found itself incapable of answering. The key issue is that current legal principles do not provide a morally appropriate method of assessing the value of death in comparison to life. The Court of Appeal took the first important step by realising that this question cannot and should not be answered. This is why, if a court wants to award damages based on the existence of a human life, it will have to look at the case from a different perspective. In this regard, *McKay* was the starting point for the legal development that was yet to happen.

The judges also unanimously gave their opinion on the law following the Congenital Disabilities (Civil Liability) Act 1976. This statute did not govern *McKay*, because the child was born before the statute was enacted. In its report regarding this Act the Law Commission stated:

We do not think that, in the strict sense of the term, an action for “wrongful life” should lie... Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role.<sup>9</sup>

The court in *McKay* held *per curiam* that the enactment of the Congenital Disabilities Act prevented the acceptance of a claim for wrongful life.<sup>10</sup>

## B. GERMANY

In Germany the BGH decided a case identical to *McKay*. A child suffered from severe disabilities after its mother had contracted rubella during the

<sup>7</sup> *ibid* [1189].

<sup>8</sup> The passage quoted by Ackner LJ can be found in Shakespeare’s *Hamlet*, Act 3 Scene 1, in which Hamlet reflects on the nature of life and death, considers suicide, and famously coins the phrase ‘to be or not to be’.

<sup>9</sup> The Law Commission, *Injuries to Unborn Children* (Law Com No 6 1974) para 89.

<sup>10</sup> *McKay* (n 3) 1187 (Stephenson LJ). The Act was amended in 1990 to adapt to the reality of *in vitro* fertilisation (see s 1a). This amendment has caused some uncertainty regarding the future of wrongful life claims that have been discussed by Rosamund Scott, ‘Reconsidering wrongful life in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies’ (2013) 72 CLJ 115. Scott argues in favour of allowing a claim that is focused on the disability and not the fact of existence. This notion cannot be discussed here.

pregnancy.<sup>11</sup> Similar to the Court of Appeal, the BGH dismissed the claim brought by the child.<sup>12</sup>

In its judgment, the BGH relied on very similar arguments to those that had guided the Court of Appeal. *McKay* was also explicitly cited. The BGH agreed that it was not possible to assess the value of death in comparison to life.<sup>13</sup> Like the Court of Appeal, the BGH also held that there was no duty owed to the child by the doctor to terminate the pregnancy.<sup>14</sup> This argument does not come as a surprise to anyone who has read *McKay*, but it is noteworthy from a German perspective. German tort law does not usually focus on the concept of 'duty' but rather on the infringement of a right.<sup>15</sup> It is not entirely new that the BGH uses this concept, but the emphasis put on the question of 'duty' does show that *McKay* heavily influenced the German court. It seems that the BGH 'borrowed' both concept and argument from the Court of Appeal.

The BGH also emphasised the moral implications of the case, holding that allowing the claim would violate the sanctity of life.<sup>16</sup> Moreover, pointing to the experiences in the Third Reich, the court added:

As a matter of principle, the judiciary of the Federal Republic of Germany, influenced by the experiences gained during the national-socialist unjust regime (*nationalsozialistische Unrechtsherrschaft*), does not allow a legally significant judgment on the value of the life of a human being and it does so with good reason.<sup>17</sup>

Allgemein erlaubt gerade die durch die Erfahrung mit der nationalsozialistischen Unrechtsherrschaft beeinflusste Rechtsprechung der Bundesrepublik Deutschland aus gutem Grund kein rechtlich relevantes Urteil über den Lebenswert fremden Lebens.<sup>18</sup>

The way in which the BGH openly discusses the judgment of the Court of Appeal and also arguments brought forward in other jurisdictions, namely the

<sup>11</sup> The BGH and others sometimes refer to the case as the "*rubella-case*".

<sup>12</sup> BGH VI ZR 114/81, NJW 1983, 1371.

<sup>13</sup> *ibid* 1374.

<sup>14</sup> *ibid* 1373.

<sup>15</sup> This is due to the structure of the central legal rule in German tort law: § 823(1) BGB. This provision gives rise to a claim in tort law only if the claimant can prove the infringement of a so-called 'absolute right', namely health and property.

<sup>16</sup> BGH VI ZR 114/81, NJW 1983, 1373.

<sup>17</sup> All German excerpts are translated into English by the author. The original German excerpts are cited below the translations.

<sup>18</sup> BGH VI ZR 114/81, NJW 1983, 1371.

US, is quite remarkable from a German perspective. German courts hardly ever take into account foreign judgments which is largely due to the strict doctrinal approach of German law. But this case can and should serve as an example of a practical comparative approach, especially in tort law, that can lead to well-reasoned decisions.

### C. COMPARISON

The above analysis shows that English courts have provided the groundwork for cases of wrongful life. The fact that German courts have adopted this approach is evidence that the Court of Appeal has presented persuasive arguments. A comparative approach has led to a well-established common foundation on which the courts on 'both sides of the Channel' have based their decisions in cases of wrongful life. The common ground shared by English and German courts is to be kept in mind when analysing the differences that have started to appear in cases of 'wrongful conception'.

### IV. WRONGFUL CONCEPTION

As English and German courts were forced to leave this common ground and further explore the implications of wrongful existence, their unity faded. Courts in the two jurisdictions ultimately adopted different approaches in cases of wrongful conception. In these cases, claims were brought against medical personnel who negligently failed to successfully perform medical procedures meant to prevent pregnancies (such as vasectomies), ultimately causing the claimants to have 'unwanted' children. Claimants in these cases have frequently tried to claim damages based on two grounds: the pain of childbirth and the costs associated with the upbringing of the child. The former has not sparked much debate as both German and English courts regard the pain suffered by the mother as recoverable damage.<sup>19</sup> This issue needs no further consideration. The financial loss caused by the upbringing of the child, however, has proven to be a controversial issue.

<sup>19</sup> BGH VI ZR 136/01, NJW 2002, 2636; *McFarlane* (n 2) (Lord Millett dissenting).



Whilst it is clear that raising children costs money, it was heavily disputed whether morality or legal policy prohibited the law from regarding such costs as 'damage'.

### A. GERMANY

This question made its way to the BGH in 1980, after lower courts had delivered various conflicting judgments regarding wrongful conception.<sup>20</sup> The case decided by the BGH concerned a mother who underwent an unsuccessful sterilisation surgery. After giving birth to a healthy child, she sought damages under breach of contract<sup>21</sup> for maintenance of her child. The Regional Court (*Landgericht*, hereafter "LG") allowed the claim, but this was overturned by the Higher Regional Court (*Oberlandesgericht*, hereafter "OLG") Bamberg.<sup>22</sup> The OLG Bamberg held that maintenance of the child was not recoverable because regarding the child as damage would violate the child's dignity as protected by Article 1(1) of the German Constitution (*Grundgesetz*, hereafter "GG").<sup>23</sup> It dismissed the notion that it was not the child itself but merely the legal obligation<sup>24</sup> of the parents to care for the child which constituted the damage. In the eyes of the court, the child and the obligation to care for it was untenable.<sup>25</sup>

The BGH in turn overruled the OLG Bamberg, holding that the maintenance costs were recoverable.<sup>26</sup> The court accepted the distinction between the existence of the child and the legal obligation of the parents to care for the child, which the OLG Bamberg had dismissed. It held that this obligation alone is the economic damage suffered by the parents and that the distinction between child

<sup>20</sup> See LG Itzehoe 6 O 66/68, FamRZ 69, 90; LG Munich I 17 O 771/69, FamRZ 70, 314; LG Freiburg 7 O 117/76, NJW 1977, 340; LG Duisburg 74 8 O 349/73; VersR 75, 342; OLG Düsseldorf 8 U 123/73, NJW 1975 595; OLG Celle 1 U 37/77, NJW 1978, 1688; OLG Zweibrücken 1 U 116/77, NJW 1978, 2340; OLG Karlsruhe 4 U 3/77, NJW 1979, 599.

<sup>21</sup> In Germany, cases of wrongful conception are discussed within contract law for two reasons: Firstly, only damage arising from infringement of a so-called 'absolute right' (*absolutes Recht*) as set out by s 823(1) BGB is recoverable under German tort law and the BGH has expressed doubts whether the maintenance costs can be claimed under tort law in BGH VI ZR 247/78, NJW 1980, 1452. Secondly, under German Contract Law there is always a contract between the doctor and the patient regardless of whether a hospital is run by the state. This does not constitute an important difference to English law, as German contract law does not follow a doctrine of strict liability, see s 280(1) BGB.

<sup>22</sup> OLG Bamberg 4 U 141/77, NJW 1978, 1685.

<sup>23</sup> *ibid* 1685.

<sup>24</sup> Under German Family Law the child has a claim against its parents to care for it (*Unterhaltsanspruch*, see Sections 1601 and following of the German Civil Code (*Bürgerliches Gesetzbuch*, hereafter "BGB")).

<sup>25</sup> OLG Bamberg 4 U 141/77, NJW 1978, 1686.

<sup>26</sup> BGH VI ZR 105/78, NJW 1980, 1450.

and economic damage does not conflict with German Family or Constitutional Law.<sup>27</sup>

The BGH also laid out general guidelines for calculating the award without, however, providing reliable rules.<sup>28</sup> According to these guidelines, the amount of damages does not depend on the actual amount spent on the care of the child but on the amount that the parents are legally obliged to provide for their child. Liability is therefore limited to the minimum amount of care. This was imposed to avoid the issue of varying amounts of damages depending on the wealth of the parents. For cases decided in 2020, based on the guidelines that were laid out in this early decision, courts can award an amount of up to 141.696€ for the birth of a healthy child.<sup>29</sup>

The BGH went on to confirm this ruling in a case regarding an unsuccessful (legal) abortion<sup>30</sup> and a case of false information given by doctors preventing a (legal) abortion.<sup>31</sup> In none of these decisions, however, did the BGH provide an extensive discussion of whether the distinction made between the child and the obligation to care for it really does avoid the moral implications of the case. It seems that the BGH tried to avoid this issue by focussing on the fact that the

<sup>27</sup> BGH NJW 1980, 1451.

<sup>28</sup> See *ibid* 1452.

<sup>29</sup> The claim of the child against its parents under German law consists of two elements. A financial care element (*Barunterhalt*) and a personal care element (*Betreuungsunterhalt*). The BGH held that the award should amount to the amount of financial care plus a reasonable amount to substitute the personal care element (BGH NJW 1980, 1452). This can mean doubling the financial element (see BGH NJW 2007, 989, para 29). The amount of the financial element, however, depends on the financial situation of the parents. As this would mean that the amount of damages would increase if the affected parents are wealthier, the BGH clarified that the amount of damages cannot be fully coherent with the amount owed to the child under family law. The practical solution is that courts award the amount that is set by law to be the minimum amount in *any* case (*Mindestunterhalt*). This minimum amount is set out by s 1612a German Civil Code in connection with a statutory instrument (secondary legislation) based on s 1612a(4) BGB (*Mindestunterhaltsverordnung*). Social benefits for children based on the German "Children Benefits Act" (*Kindergehalt nach Bundeskindergeldgesetz*) are subtracted. The amount is calculated for 18 years. For 2020, the minimal financial care as set out by the statutory instrument is 369€ for the first six years, 424€ for the next and 497€ for the last six years. Over 18 years this adds up to 92.880€. This can be doubled to substitute the personal care element, adding up to 185.760€. Benefits for children amount to 204€ a month, adding up to 44.064€ in total. This adds up to 141.696€ in total.

<sup>30</sup> BGH VI 244/83, NJW 1985, 2752.

<sup>31</sup> BGH VI ZR 85/82, NJW 1984, 658.



parents were now burdened with the costs of maintaining a child and holding that this was therefore an “easy case” of straight-forward economic damage.

Three years later, however, the debate was sparked anew by a decision of the Federal Constitutional Court<sup>32</sup> (*Bundesverfassungsgericht*, hereafter BVerfG). In a landmark decision involving the review on constitutional grounds (*abstraktes Normenkontrollverfahren*)<sup>33</sup> of German laws on abortion, the Second Senate of the BVerfG passed a brief remark that had the potential to completely reverse the judicial treatment of wrongful conception.<sup>34</sup> The Senate noted:

The legal qualification of the existence of a child as damage is prohibited by constitutional law... The duty of the state to respect every human existence in and for itself... does not allow regarding the obligation to care for a child as damage. In this regard, the decisions of the civil courts... are in need of review.

Eine rechtliche Qualifikation des Daseins eines Kindes als Schadensquelle kommt hingegen von Verfassungs wegen... nicht in Betracht. Die Verpflichtung aller staatlichen Gewalt, jeden Menschen in seinem Dasein um seiner selbst willen zu achten... verbietet es, die Unterhaltspflicht für ein Kind als Schaden zu begreifen. Die Rechtsprechung der Zivilgerichte... ist im Blick darauf der Überprüfung bedürftig.<sup>35</sup>

As the decision did not actually concern any cases regarding wrongful conception, the comments were *obiter dictum* and were therefore not legally binding.<sup>36</sup> It is worth considering, however, that in German law, the opinions of the BVerfG

<sup>32</sup> The Federal Constitutional Court fulfils a special role within the German court system. Regular private law disputes are settled by the so-called civil courts (*Zivilgerichte*), the BGH being the highest civil court. There are no appeals against BGH decisions. The Federal Constitutional Court has jurisdiction over a limited number of actions that solely regard German Constitutional Law. These actions include actions brought by citizens against judicial decisions on the basis that they violate constitutional law (*Verfassungsbeschwerden*). This way, decisions of the BGH and other civil courts can be overturned, but only on constitutional grounds.

<sup>33</sup> This is a procedure in which the BVerfG reviews whether or not a law conforms with constitutional law, without this question being raised in a proceeding in front of another court. This action can be brought by the federal government, a state government, or a quarter of the members of the German federal parliament (*Bundestag*). This specific action was brought by the government of Bavaria.

<sup>34</sup> BVerfG 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, NJW 1993, 1751.

<sup>35</sup> *ibid* 1764.

<sup>36</sup> Decisions of the BVerfG are generally binding for all courts according to s 31 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), but that does not apply to remarks made *obiter dictum* such as in this case.

are highly persuasive. After this decision, it was clear that the strategy of the BGH had failed. The moral implications were picked up by the BVerfG and the BGH saw itself confronted with the imminent threat of being overturned. Nonetheless, when the time came for the BGH to review its opinion, the court decided not to follow the remarks made by the Second Senate.

The BGH held that no legal principle was violated by regarding the obligation to care for the child to be damage.<sup>37</sup> This time, the BGH discussed the problems addressed by the BVerfG in detail, rejecting the argument that the award of damages violates the child's dignity. The BGH defended the distinction made in its previous decision, holding that while the birth of the child was, of course, a cause for the obligation of the parents and the consequent financial loss, regarding this as damage carried no 'verdict' with regard to the child.<sup>38</sup> The BGH did not attribute a negative meaning to the legal classification of a certain event as damage.<sup>39</sup> Furthermore, the BGH presented an argument on the basis of coherence: As the wish of the parents to prevent childbirth is seen by the law to be legitimate, the law also has to compensate for the financial loss caused by childbirth.<sup>40</sup> This way, the BGH delivered an extensive reply to the remarks of the BVerfG.

One further aspect that was not discussed by the BGH in its first judgment but is addressed in the second judgment, although in a very brief manner, is the question of loss of autonomy. The court explicitly rejected the idea of awarding damages for the loss of autonomy suffered by the parents, without however giving any compelling arguments.<sup>41</sup> The lack of discussion in this regard is not surprising, as it is exactly the kind of discussion that the BGH apparently wanted to avoid when it chose to apply the 'easy' concept of economic damage.

The issue then made its way to the BVerfG for a second time, this time by way of a direct challenge on constitutional grounds (*Verfassungsbeschwerde*)<sup>42</sup> of two judgments, in which lower courts had followed the ruling of the BGH. These challenges ended up before the First Senate of the BVerfG, which did not follow

<sup>37</sup> BGH VI ZR 105/92, NJW 1994, 788.

<sup>38</sup> *ibid* 791.

<sup>39</sup> *ibid* 792.

<sup>40</sup> *ibid* 788.

<sup>41</sup> *ibid* 791–792.

<sup>42</sup> This action can be brought by anyone who claims that their constitutional rights were violated by acts of the German State, see Art 93(1) Nr. 4a GG. It can also be used to challenge judgments on constitutional grounds, which is what happened in this case.

the opinion of the Second Senate.<sup>43</sup> It held that the decisions based on the opinion of the BGH did not violate constitutional law.<sup>44</sup> The starting point in this decision was Article 1(1) GG in its function as a 'guideline' for judicial decisions.<sup>45</sup> The First Senate held that the BGH did not violate the principle of human dignity because the value of the child's existence is not dependent on who bears the costs of raising the child. It saw support for this in the different factual circumstances under which maintenance claims can be owed by a person other than the parents.<sup>46</sup> For example, if a parent is killed by an act of negligence, the tortfeasor is liable for the maintenance claims the child would have had against the victim (see Section 844(2) BGB). The court also pointed out that the details of a maintenance claim can vary, even when owed by a parent. For example, a person adopting his wife's or husband's child after the other biological parent has died owes less financial support to the child than the surviving biological parent, even though the new father or mother is otherwise regarded as a 'full parent'.<sup>47</sup> From these and other examples, the court deduced that the legal structure of the maintenance claim, including the question of who the maintenance claim is owed by, is not necessarily tied to the child. Therefore, the court held that holding the doctor liable for the maintenance costs in a case of wrongful conception does not carry any meaning with regard to the child's value in the eyes of the law. This way, the First Senate provided further groundwork for the argument that the BGH had already brought forward.

This decision concluded an almost unprecedented judicial battle in Germany. The BGH chose to approach the issue in a more or less conventional way but was faced with the evolutionary pressure of wrongful conception at least after the BVerfG had demanded a more extensive treatment of the moral implications. The intensity of the debate shows just how much pressure German law was under. Ultimately, however, the BGH was able to stick to its approach, leading to an

<sup>43</sup> S 16 of the Federal Constitutional Court Act requires a joint decision of both Senates in case one Senate wants to overturn decisions made by the other Senate. The First Senate, however, refused to hand the matter to a joint hearing as it was of the opinion that the remarks made by the Second Senate were not part of the ratio of the first decision and therefore did not fall under s 16. A judicial statement issued by the Second Senate (NJW 1998, 523), in which the Second Senate expressed that it was of the opinion that s 16 did apply, did not have any effect.

<sup>44</sup> BVerfG 1 BvR 479/92, 1 BvR 307/94, NJW 1998, 519.

<sup>45</sup> *ibid* 521.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

integration of wrongful conception into tort law rather than an evolution of tort law because of wrongful conception.

## B. ENGLAND AND WALES

In England, cases regarding wrongful conception also began to occupy the courts around 1980. In *Scuriaga v Powell*<sup>48</sup> it was first held that a doctor who negligently failed to carry out an abortion was liable for the pain suffered during birth, the prospective and actual loss of earnings and the diminution of marriage prospects. The report in this case does not mention damages for maintenance of the child. Similar cases in the following decades led to a variety of outcomes in lower courts.<sup>49</sup> However, it was not until 1999 that the issue reached the House of Lords in the case of *McFarlane v Tayside Health Board* (hereafter, *McFarlane*).<sup>50</sup>

### (i) *McFarlane v Tayside Health Board*

In *McFarlane v Tayside Health Board* (hereafter, *McFarlane*), a claim was brought by a married couple who had decided not to have another child. The husband underwent vasectomy, which was carried out by an employee of the defendant. After surgery, the husband submitted sperm samples to the defendant's hospital for an analysis. The husband was then notified that the vasectomy had been successful and contraceptive methods were no longer necessary. However, about one year later, his wife got pregnant and went on to give birth to a healthy child. The couple brought a claim against the Health Board. The parents claimed damages for the pain suffered by the mother, which was allowed by the House of Lords, Lord Millett dissenting. The parents also claimed damages for the upbringing of the unwanted child.

The Lord Ordinary dismissed this claim, but this was overturned by the Inner House of the Court of Sessions, which held that there was no principle ruling out the *prima facie* liability of the defendant. The defendant appealed.

The House of Lords unanimously allowed the appeal. The judgment shows, however, that a unanimous decision is not always supported by a clear and unanimous *ratio*. Lord Steyn later termed it a 'gruesome task'<sup>51</sup> to discuss the opinions expressed in *McFarlane*. The opinions discuss a variety of approaches, leaving behind a tangled web of arguments. A complete and comprehensive

<sup>48</sup> [1979] 123 SJ 406.

<sup>49</sup> See *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 (CA); *Thake v Maurice* [1986] QB 644 (CA); *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Allan v Greater Glasgow Health Board* [1998] SLT 580.

<sup>50</sup> *McFarlane* (n 2).

<sup>51</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 321.

discussion of the opinions is beyond what is possible and necessary in this article and has already been presented elsewhere.<sup>52</sup> However, it is necessary to outline the main ideas expressed by the judges in order to understand the further development of the law in later cases.

The different opinions expressed in the speeches can be divided into two groups. One group of judges, comprising Lords Slynn, Clyde, and Hope, focused on case law and principles of tort law in order to justify their decision, while the other group, comprising Lords Steyn and Millett, focused on the policy implications of the case. Both approaches, however, did not provide the discussion of both concepts *and* policy that was necessary to settle this issue, which will also be shown in the following.

### 1. The conceptual approach

The strongest voice in this group was Lord Slynn, who dismissed the claim based on *Caparo Industries Plc v Dickman* (hereafter, *Caparo*).<sup>53</sup> He clarified that his decision was not based on policy considerations but on the “inherent limitations of liability”.<sup>54</sup> Applying the *Caparo* test, he decided that there was no duty of care, because liability for the maintenance of a child would not be fair, just and reasonable.<sup>55</sup> Similarly, Lord Clyde decided to rely on the concept of ‘reasonable compensation’, holding that the claim must fail as the damages sought were disproportionate to the breach of duty.<sup>56</sup>

There are two key issues pertaining to this approach. Firstly, this approach masks the actual reasoning behind the judicial opinion. It is indeed striking, that both Lords did not give further arguments for why compensation would not be reasonable. It appears that both Lords, going against their declared approach, considered the moral implications but chose not to express this. This was also criticised by Lord Steyn:

My Lords, to explain decisions denying a remedy ... by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. And

<sup>52</sup> See Kenneth McK Norrie, ‘Failed sterilisation and economic loss: Justice, law and policy in *McFarlane v Tayside Health Board*’ (2000) 16 PN 76; Laura Hoyano, ‘Misconceptions about Wrongful Conceptions’ (2002) 65 MLR 883; Nicolette Priaulx, ‘Joy to the World! A (Healthy) Child is Born! Reconceptualizing ‘Harm’ in Wrongful Conception’ (2004) 13 Social & Legal Studies 5.

<sup>53</sup> [1990] 2 AC 605 (HL).

<sup>54</sup> *McFarlane* (n 2) [76].

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* [105].

judges ought to strive to give the real reasons for their decision.<sup>57</sup>

Secondly, this approach does not take into account the nature of concepts in tort law. The concepts laid out in *Caparo* and elsewhere are not blind, mechanical limits of liability but rather legal institutions that provide a structure for solving situations of colliding interests. It is not possible to apply these concepts in a purely 'technical' manner. The weight of the colliding interests is what decides a case. This approach is trying to put on a mask that tort law simply does not provide.

## 2. The policy-approach

Turning now to the approach that moves away from tort law concepts and towards the moral implications of the case. Lord Steyn addressed whether or not a court should follow moral guidance:

The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law.<sup>58</sup>

He continued by expressing his belief that society would be opposed to liability of the surgeons and health system in cases of wrongful conception, referring to 'distributive justice' as the underlying principle for this belief.<sup>59</sup> He held that there is a public perception that the Health Services should not be burdened with the costs of raising a child.

Lord Millett also openly focused on policy, holding that the principle of 'sanctity of human life', which was also decisive in *McKay*, does not allow the law to view childbirth (or the costs attributed to raising a child) as damage:

"But society itself must regard the balance [of the joys and burdens of raising a child] as beneficial. It would be repugnant to its own sense of values to do otherwise."<sup>60</sup>

The policy-approach has been criticised in academic writing for lacking empirical and legal basis, especially with regard to the assumptions made by Lord Steyn.<sup>61</sup> On the other hand, it is submitted that this case simply cannot be solved appropriately without taking policy considerations into account, which is evidenced

<sup>57</sup> *ibid* [82].

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*.

<sup>60</sup> *McFarlane* (n 2) [114].

<sup>61</sup> Victoria Chico, 'Wrongful Conception: Policy, Inconsistency and the Conventional Award' (2007) 8 *MedLInt* 139, 145–149, 152–154; Hoyano (n 52) 904.



by the judicial struggle in Germany following the first 'policy blind' judgment of the BGH. But it is indeed striking that this approach, while making the necessary step towards a policy-based decision, stops short of providing an extensive and conclusive discussion of policy arguments and the way in which these can be included in a case of tort law. The principle of sanctity of human life may well be a persuasive argument but there is still an imminent lack of discussion and conceptual analysis. This is again, evidenced by the fact that the BGH discussed the same moral principles but arrived at the opposite conclusion.

Interestingly, Lord Steyn made mention of the German judgments. However, he only mentioned the first judgment of the BVerfG and the following judgment of the BGH, leaving out the important second judgment of the BVerfG that was also delivered before *McFarlane*.<sup>62</sup> That is because Lord Steyn relied on the 3rd edition of *Markesinis's German Law of Torts* (OUP 1997), that was published in 1997 and therefore did not include the second decision of the BVerfG, which was delivered in 1998. It is, of course, doubtful whether this missing piece of information would have changed Lord Steyn's mind, but it is an interesting example of how comparative analysis can also be a risky business.

(ii) *Parkinson v St James and Seacroft University Hospital NHS Trust*

With regard to the lack of discussion, the judgment in *McFarlane* is akin to the first judgment delivered by the BGH. In both judgments the difficult question of how to handle the moral implications of the case was the elephant in the room. It is no surprise that, just like in Germany, the issue was far from being settled after the House of Lords had delivered their first judgment.

English courts reconsidered these controversial issues in *Parkinson v St James and Seacroft University Hospital NHS Trust* (hereafter, *Parkinson*).<sup>63</sup> The facts are a slight variation of *McFarlane*. A woman underwent sterilisation surgery at the defendants' hospital, which was, however, carried out negligently, leaving her able to conceive children. The woman went on to conceive a child, who was born with severe disabilities. She brought a claim against the hospital trust, claiming maintenance for her child. The trial judge awarded damages for the special costs that arose because of the disability, but not for basic maintenance. Both parties appealed. The Court of Appeal dismissed both appeals, with speeches delivered by Brooke and Hale LJ.

Brooke LJ held that this case, because of the special needs of the child, required different treatment and judgment in the light of 'distributive justice'.<sup>64</sup>

<sup>62</sup> *ibid* [80].

<sup>63</sup> [2002] QB 266 (CA).

<sup>64</sup> *ibid* [49]–[51].

He held that compensation for the special costs of raising a disabled child would be fair, just and reasonable and a limitation therefore not backed by policy implications. This opinion, just like those criticised above, suffers from the same lack of groundwork and discussion.

Hale LJ delivered a detailed speech, providing an extensive discussion of *McFarlane*. Before turning to the material aspects of the case, Hale LJ delivered some very noteworthy groundwork on the burdens of pregnancy and child-birth for the mother.<sup>65</sup> Her speech is the first to recognise this issue as an issue of gender equality and feminist jurisprudence, by expressly relying on the loss of autonomy suffered by the mother specifically. Based on this, she also brought up some practical criticism with regard to the outcome of *McFarlane*:

Late abortion brings with it particular problems [...]. Their Lordships unanimously took the view that it was not reasonable to expect a woman to mitigate her loss by having an abortion. Realistically, some may think, the result of their Lordships' decision could well be that some have no other sensible option.<sup>66</sup>

Importantly, she held that, in *McFarlane*, only Lord Slynn based his opinion on the lack of a duty of care, which would render any damage unrecoverable in any case, while the majority of speeches left enough room for the court to free itself from the grip of *McFarlane*.<sup>67</sup> She came to the conclusion that the ratio in *McFarlane* was based on a 'deemed equilibrium' between the joys of childbirth and the costs of childbirth.<sup>68</sup> In her opinion, this equilibrium is disturbed if the child is disabled.<sup>69</sup> Consequently, she held that the additional costs of raising a disabled child were recoverable in order to re-establish the equilibrium.

Hale's speech is the first to provide a conclusive foundation. In this regard, her speech is of a much higher argumentative value than those discussed so far. However, both of Hale LJ's interpretations of *McFarlane* are only supported by very few passages in the *McFarlane* judgment. Most importantly, the notion of an 'equilibrium' between the joys and burdens of parenthood was not decisive in any

<sup>65</sup> *ibid* [63]–[73]

<sup>66</sup> *ibid* [66].

<sup>67</sup> *ibid* [86].

<sup>68</sup> *ibid* [89]–[90].

<sup>69</sup> *ibid* [90].

of the speeches. On the contrary, the idea of setting-off the benefits brought by the child was explicitly dismissed by several of the Lords.<sup>70</sup>

These considerations give good reason to doubt that her opinion is in line with *McFarlane*. While the following decision of the House of Lords did not settle this issue, Hale's approach was labelled "anomalous"<sup>71</sup> and "not... consistent with *McFarlane*".<sup>72</sup> This has led academic writers to the conclusion that *Parkinson* is still good law, but vulnerable to challenge.<sup>73</sup>

(iii) *Rees v Darlington Memorial Hospital NHS Trust*

The last leading case is *Rees v Darlington Memorial Hospital NHS Trust* (hereafter, *Rees*), which provides yet another variation of the facts in *McFarlane*. In this case, a severely visually impaired mother underwent sterilisation surgery, which was not successful due to the negligence of the surgeons. She went on to give birth to a healthy child. The Court of First Instance did not award any damages. This decision was overturned by the Court of Appeal, which (analogous to *Parkinson*) awarded damages for the costs that arose because of the mother's disability. The claimant appealed against that decision, asking the House of Lords to consider overturning *McFarlane* or to amend its judgment for cases that involve disabilities.

The court unanimously decided that *McFarlane* was not to be overturned.<sup>74</sup> However, the court did depart from *McFarlane* by finding an alternative legal basis for a monetary award. To bridge the gap between any new award and the ruling in *McFarlane*, the court made use of two ideas set out in *McFarlane* and *Parkinson*.

The first idea was suggested by Lord Millett in *McFarlane*. In his speech he had suggested awarding a fixed conventional award to "reflect the true nature of the wrong".<sup>75</sup> In his opinion the claimants had suffered both injury and loss, which entitled them to a conventional award that in his opinion should not exceed £5000. The second idea was provided by Hale's speech in *Parkinson*. She put forth the argument that the claim should be based on the loss of autonomy that the mother had suffered.<sup>76</sup> Combining these approaches, the majority (Lords Bingham, Nicholls, Millett and Scott) awarded a lump sum of £15,000 for loss of autonomy. This conventional award was not based on the fact that the mother

<sup>70</sup> *McFarlane* (n 2) [102]–[103] (Lord Clyde), [81]–[82] (Lord Steyn), [111] (Lord Millett).

<sup>71</sup> *Rees* (n 51) [9].

<sup>72</sup> *ibid* [147].

<sup>73</sup> Gillian Douglas, 'Rees v Darlington Memorial Hospital NHS Trust' [2004] Fam Law 22; Samantha Singer, 'Clinical Negligence - Failed Sterilisation - Wrongful Conception' (2004) 26 Journal of Social Welfare and Family Law 403, 413–414.

<sup>74</sup> *Rees* (n 51) [7], [16], [32]–[33], [50], [86], [103].

<sup>75</sup> *McFarlane* (n 2) [114].

<sup>76</sup> *Parkinson* (n 63) [56].

in this case was disabled. The ruling in *Rees* is therefore applicable in any case of wrongful conception, overruling both *McFarlane* and *Parkinson* at least in relation to the practical outcome.

Dissenting speeches were delivered by Lords Steyn, Hope, and Hutton, who held that the Court of Appeal had decided *Parkinson* correctly and that the reasoning in *Parkinson* should also be applied in *Rees*.<sup>77</sup> Lord Steyn and Lord Hope also expressed their concerns about the lack of legal basis for the creation of a conventional award.<sup>78</sup> Both arguments, however, were clearly dismissed by the majority.

This judgment is the decisive step that English law has taken in the area of wrongful life. The court, while not unanimous in outcome, unanimously held that the autonomy of the mother required, at least in some cases, the award of damages. Contrary to the development in Germany, English law has evolved under the pressure of wrongful conception. The important question after *Rees* is how the concept of loss of autonomy fits into the structure of English tort law.

## V. CONCEPTUALISING WRONGFUL CONCEPTION

English law is now in uncharted territory. While some commentators have embraced *Rees* for the practical solution it provides,<sup>79</sup> it is imperative to explore the theoretical questions raised by the judgment in *Rees*. This is not purely an academic exercise, but one of high practical relevance as the new approach adopted by the House of Lords will be the decisive authority when dealing with cases of wrongful survival.<sup>80</sup> In this regard, *Parkinson* (even if it is still considered good law) cannot provide guidance as it, at its core, still stuck to the old concept of compensating the financial loss.

The first approach taken to conceptualise *Rees* understands the judgment to have acknowledged 'loss of autonomy' as a regular actionable head of damage in tort law which can be claimed under negligence, giving rise to substantial damages. I argue, however, that this approach is not supported by case law and is

<sup>77</sup> *ibid* [34]–[39], [54]–[69], [88]–[96].

<sup>78</sup> *ibid* [40]–[47], [70]–[77].

<sup>79</sup> Chico (n 61) 152–154.

<sup>80</sup> Another case in which this discussion could have made a difference is *B v IVF Hammersmith Ltd v R* [2018] EWCA Civ 2803. However, the Court of Appeal did not discuss the question of loss of autonomy in this case, which is why this decision will not be discussed here.

not conceptually sound. After discussing this issue, I turn to an alternative concept that understands wrongful conception to be a new intentional tort.

#### A. ACTIONABILITY OF “LOSS OF AUTONOMY” IN NEGLIGENCE

Acknowledging loss of autonomy as a regular actionable head of damage in tort law has been supported by various legal scholars.<sup>81</sup> It has been recognised as the right step to acknowledge the importance of individual autonomy, especially in modern medical law, moving away from the strongly criticised focus on paternalism.<sup>82</sup> This opinion raises two fundamental questions. Firstly, does loss of autonomy fit into the structure of English tort law? Secondly, is loss of autonomy as an actionable head of damage supported by case law?

With regard to the first question, I argue that acknowledging loss of autonomy as actionable damage does not fit into the structure of English tort law or would at least constitute a dramatic shift that requires further justification. Regarding the second question, I argue that *Rees* does not support this concept. I further argue that the law of false imprisonment, which also relates to questions of autonomy, also cannot provide a foundation for acknowledging loss of autonomy as these cases are not comparable to wrongful conception and general loss of autonomy.

##### (i) *Loss of autonomy and the structure of negligence*

The structure of the tort of negligence is to protect abstract rights by offering compensation for loss in ‘real-world interests’ which correspond to these abstract rights. Substantial damages for the infringement of an abstract right, so-called vindicatory damages, were explicitly rejected by a 6–3 majority of the Supreme Court in *R (on the application of Congo (Lumba)) v Secretary of State for the Home Department*.<sup>83</sup> Substantial damages therefore cannot be based solely on the infringement of a right. The building blocks of substantial damages are the factual

<sup>81</sup> Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59, 77–80; Tsachi Keren-Paz, ‘Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition’ (2018) 26 MedLR 585; Nicolette Priaux, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish 2007) 78; Craig Purshouse, ‘Judicial Reasoning and the Concept of Damage: Rethinking Medical Negligence Cases’ (2015) 15 MedLInt 155, 176–181.

<sup>82</sup> Priaux (n 81); Tsachi Keren-Paz, ‘Compensating Injury to Autonomy: A Conceptual and Normative Analysis: in: Kit Barker and others (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 411–439.

<sup>83</sup> [2011] UKSC 12, [2012] 1 AC 245. For a different approach, see Stevens, *Torts and Rights* (OUP 2007). His concept, however, has not been adopted by the courts.



consequences connected to the infringement of a right. This moves the centre of attention from abstract ideas to factual, real-world states of matter.

The idea of autonomy is an abstract one. Autonomy in this context describes the idea 'self-authorship' of one's destiny.<sup>84</sup> The basic principle is that every human has the right – and capability – to make his or her own decisions. This idea, however, does not have an equally corresponding real-world interest, because the right to autonomous decisions does not mean that there is a protected real-world interest according to which the world is shaped according to our decisions. There is only the interest in the *chance* that the world would correspond to our decisions. This is what Lord Bingham seems to have been discussing as the "opportunity [of the mother] to live her life in the way that she wished and planned".<sup>85</sup> The conceptual object of compensation in wrongful conception cases would therefore be the loss of the chance to put a 'family plan' into practice.

The question, ultimately, is whether this loss of chance can – and should – be calculated. This has a practical side, as there is no clear basis for calculating damages.<sup>86</sup> It also has to be kept in mind that this concept would not only apply in wrongful conception cases but has the potential to apply to a variety of cases, bearing the risk of arbitrary and inconsistent decisions. From a policy perspective, one could also make the argument that evaluating the loss of chance as a consequence of an infringement of autonomy bears the risk of promoting further commercialisation of important areas of human autonomy. It could be the first price tag to be put on reproductive autonomy. As unpalatable as this may seem, however, the alternative might be to not sufficiently protect autonomy. The policy issue should therefore not be overestimated.

This question also directly relates to the concept of damage. Damage has often been thought to be 'an abstract concept of being worse off'.<sup>87</sup> Loss of autonomy challenges this concept in two ways, as *Purshouse* has pointed out.<sup>88</sup> Firstly, loss of autonomy can often lead to a state in which the claimant is objectively better off.<sup>89</sup> Secondly, whether loss of autonomy leaves someone worse off is dependent on whether this person was planning on exercising their autonomy.<sup>90</sup> In this regard, the damage would be subjective instead of objective, which differs from the

<sup>84</sup> For further discussion and reference see Keren-Paz (n 81) 587–588.

<sup>85</sup> *Rees* (n 51) [8].

<sup>86</sup> In this regard, however, commentators have expressed their faith in the judiciary to find suitable measurements, see *Purshouse* (n 81); Nolan (n 81) 87.

<sup>87</sup> *Rothwell v Chemical and Insulating Co Ltd* UKHL [2007] 39, [2008] 1 AC 281 [289] (Lord Hoffmann).

<sup>88</sup> See Craig Purshouse 'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?' [2015] 22 Torts Law J 226.

<sup>89</sup> *ibid* 237–238. Purshouse uses *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 as an example.

<sup>90</sup> *ibid* 238.



conventional assessment of damage. Ultimately, human autonomy is of such a different quality compared to other kinds of damage, that the concepts developed in negligence are simply not suited to accommodate the concept of autonomy.

It is therefore submitted that loss of autonomy should not constitute a regular head of damage. While I agree that there is a need to further integrate questions of autonomy into tort law, this is not the way forward. It would lead to a significant amount of uncertainty and call into question the concepts of negligence in a way that could cause serious incoherence.

(ii) *Loss of autonomy and the case law*

Nevertheless, the second question regarding the support of case law still needs to be answered. The first judgment that could provide the foundation for loss of autonomy in the law of negligence is *Rees*. In *Rees*, however, the complex issues discussed above were not addressed by the majority, which simply adopted a number proposed by Lord Bingham. As the acceptance of loss of autonomy as an actionable loss would bring a significant change to the English tort law system, it is argued that the decision in *Rees* does not offer enough support for it to be deemed the law.<sup>91</sup> It is important to remember that English law, like other jurisdictions, has chosen to adopt a careful approach to acceptance of non-pecuniary damages. This criticism is supported by the decision in *Shaw v Kovac* where the Court of Appeal rejected the approach in *Rees* as “contrary to principle”.<sup>92</sup> It has also been thought that *Rees* conceptually contradicts the decision in *Chester v Afshar*.<sup>93</sup>

While *Rees* does not therefore support this new concept, other judgments might. The area of law that could answer this question is the law of false imprisonment, as it also relates to questions of autonomy. In this area, English courts have developed a complex jurisprudence on the measurement of damages that could be seen as compensation for loss of autonomy, resulting in awards ranging from as little as five<sup>94</sup> to tens of thousands<sup>95</sup> of pounds. The damages in these cases were awarded for the consequences of the infringement of the right to personal freedom (of movement): loss of time, loss of reputation, mental suffering caused by the feeling of being locked in.<sup>96</sup> In this area of the law, the courts, almost tacitly, have acknowledged the immediate factual consequence (namely loss of time) of

<sup>91</sup> Purshouse (n 81).

<sup>92</sup> [2017] EWCA Civ 1028 [67]. See Keren-Paz (n 81) 599–602 where he offers a different interpretation to the *ratio* in this decision to reconcile it with the actionability of loss of autonomy.

<sup>93</sup> [2004] UKHL 41, [2005] 1 AC 134; see Purshouse (n 81).

<sup>94</sup> *Walker v Commissioner of the Police of the Metropolis* [2014] EWCA Civ 897, [2015] 1 WLR 312.

<sup>95</sup> See for example £17,500 in *R (on the application of MK (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 980, [2010] 4 WLUK 517.

<sup>96</sup> James Edelman, *McGregor on Damages* (20th edn, Sweet & Maxwell 2018) para 42-013.

the infringement of autonomy as recoverable damage. However, loss of time is a head of damage that raises far fewer controversial questions than loss of autonomy in general or loss of reproductive autonomy specifically. The judgments regarding false imprisonment have consequently not addressed the issues laid out above. Therefore, whilst in this area of law there has been a partial acknowledgement of a specific loss of autonomy as recoverable damage, this does not provide any justification outside the tort of false imprisonment.

Therefore, both conceptual theory and case law do not support the acknowledgement of loss of autonomy as actionable damage. While the support of case law could, of course, change over time, the theoretical arguments stand. There is, however, an alternative: the recognition of a new intentional tort.

## B. WRONGFUL CONCEPTION AS AN INTENTIONAL TORT

The second approach, which is often mentioned but seems to have garnered less support, is that wrongful conception should be regarded as a new kind of intentional tort.<sup>97</sup> Such a tort would be actionable *per se*, which is *prima facie* attractive. It avoids the problem of fitting autonomy into the concept of damages in negligence, while still protecting the idea of autonomy. It also seems to fit into the general concept of intentional torts, which is to protect certain rights that are regarded as especially important. Looking at the tort of trespass to the person, there is already a significant protection of important areas of autonomy. While autonomy as a concept is too broad to be protected by a tort of 'infringement of autonomy', there is justification for protecting further specific areas. Especially from a perspective of gender equality, as Hale LJ has rightly pointed out, the right of a woman to decide if and when to have children is worthy of such further protection.

I find this concept to be persuasive. An intentional tort that is shaped according to the principles of English tort law, provides a suitable method to integrate loss of autonomy into English tort law without undermining settled concepts. It would bring at least some acknowledgment that a legal wrong has been committed and someone's rights have been infringed. However, this concept is in conflict with the judgment in *Rees* and is not suitable for providing appropriate financial support for families that are 'burdened' with cases of wrongful conception. This is because firstly, the facts of *Rees*, and the facts of most cases of wrongful conception, do not allow an application of an intentional tort as they are usually based on negligence, and secondly, because this tort cannot provide a remedy that amounts to £15,000. Hence, after laying out the conceptual shape of the tort

<sup>97</sup> Shaun Elijah Tan, 'The Right Approach to Wrongful Conception' (2015) 4 OULJ 28, who, however, does not discuss the question of substantial damages for 'loss of autonomy'.

and the remedies available under this tort, I will discuss the relationship between this concept and *Rees* and argue that, instead of *Rees*, financial support should be provided by a statutory provision.

(i) *The conceptual shape*

To stay within the principles of English law, the tort of wrongful conception (or infringement of autonomy) would need to be conceptually shaped in a way that is equal to other torts protecting autonomy, such as the tort of trespass to the person.<sup>98</sup> The implications of this are twofold.

Firstly, this means that not all conduct can generate liability. Because there is no general duty to comply with the wishes of other people, a mere omission is not sufficient. However, conduct that intervenes with another person's autonomy by actively preventing them from acting on their wishes, is conduct that does not comply with the right to autonomy. Take, for example, the case of a doctor carrying out a sterilisation against a patient's will.<sup>99</sup> This does not only infringe the right to bodily integrity but also actively interferes with the possibility of the patient to exercise their reproductive autonomy.

Secondly, this imposes the requirement of *intentional* conduct, just as trespass to the person<sup>100</sup> requires intentional conduct.<sup>101</sup> The requirement of intent for a tort to be actionable *per se* is a fundamental principle of English tort law, because only intentional conduct constitutes the kind of anti-social behaviour that justifies nominal damages.<sup>102</sup> This is especially true with regard to infringement of autonomy, because the autonomy of the victim is something that is not easily foreseeable (and not actually visible) by the tortfeasor and therefore constitutes a high risk of negligent behaviour.

As the tortfeasor of an intentional tort has to intend to infringe the specific *right* that is protected, the test for intent in this case would have to be whether the defendant intended to interfere with the autonomous choice of the victim to have (or not to have) children. The tortfeasor therefore also has to know, that the victim wanted to exercise their reproductive autonomy in a certain way, otherwise there is no intentional interference. It might be argued that just like accepting loss of

<sup>98</sup> The following implications were not discussed by Tan (n 97), who seems to favour a tort that would also apply to the facts of *Rees*.

<sup>99</sup> This case seems to raise similar questions as the case of *IVF Hammersmith* (n 80), which shows that the Court of Appeal has missed a chance to discuss these questions.

<sup>100</sup> *Fowler v Lanning* [1959] 1 QB 426 (CA).

<sup>101</sup> Nolan (n 81) 79.

<sup>102</sup> Frederick Pollock, *The Law of Torts* (15th edn, Stevens and Sons 1951) 139; Abraham Harari, *The Place of Negligence in the Law of Torts* (The Law Book Co. of Australasia Pty Ltd 1962) 145: "There is no affront in negligent contact."

autonomy as a head of damage, this also brings the subjective will of the victim into tort law. However, this counter-argument should be rejected. It is a different question whether the tortfeasor has to be aware of the victims wishes in order to commit a tort at all or whether the victims wishes, without considering whether the tortfeasor was aware of them, decide on the existence and amount of damage.

(ii) *The available remedies*

The next conceptual question that needs to be answered is what remedies are available to the claimant under this new tort, most importantly whether substantial damages are available. Substantial damages cannot be based on the loss caused by the maintenance of the child as held in *McFarlane* and *Rees*. As shown, loss of autonomy does not give rise to substantial damages. Acknowledgement of this head of damage also does not follow from the acknowledgement of an intentional tort of wrongful conception. It is a completely different question whether the law recognises the infringement of a right as a legal wrong or whether it regards the immediate factual consequence of this infringement as recoverable, monetary loss. No conclusion with regard to the latter question can be drawn from the answer given to the former. The gap between the two is filled by the concept of nominal damages. If the acknowledgement of an intentional tort would lead to the acknowledgement of the immediate consequences as recoverable damage, there would be no need for the concept of nominal damage, as there would always automatically be recoverable damage.

Notwithstanding this issue, a court may, however, award nominal damages based on the concept of wrongful conception as an intentional tort. This does not raise the same questions as awarding substantial damages, as the purpose of nominal damages is not to compensate a loss the claimant has suffered but to acknowledge a legal wrong that has been committed. Therefore, autonomy would in this case only be acknowledged as an abstract right without the need to fit it into the regular concept of damage. Although nominal damages only amount to a few pounds, this way there is at least legal recognition of the loss of autonomy that has been suffered. This is the decisive difference to handling wrongful conception in the law of negligence.

(iii) *The conflict with Rees*

However, this conceptualisation of wrongful conception does not fully support the decision in *Rees*. While the doctor in *Rees* can be said to have actively interfered with the patient's autonomy by giving the impression that the mother was now sterilised although she was not, he did not intend to interfere with her personal autonomy. The infringement was due to his mere negligence that caused

the failure of the sterilisation procedure. The facts of *Rees* could only fall under an intentional tort of wrongful conception if the doctor had intended not to carry out the sterilisation successfully while giving the impression that he did. Finally, there is no conceptual basis for the award of £15,000. As stated above, there is no sufficient basis for substantial damages and the award of £15,000 is too high to constitute nominal damages.

The first question, that follows from this, is whether *Rees* should be treated as an authority in further cases that deal with infringement of autonomy. I argue that it should not. The judgment on its own does not provide suitable groundwork for conceptualising infringement of autonomy in tort law. Even more so, it stands in the way of the concept that was laid out above and that I argue should be acknowledged by English courts in the future. *Rees* should be treated as an anomalous decision without further authority with regard to loss of autonomy in general.

The second question is how to deal with the £15,000 that was awarded in *Rees* and has been awarded by courts since. It is submitted that, notwithstanding that *Rees* should not be regarded as authority, the award is justified from a perspective of social policy. Parents, who never wanted to be parents, should receive basic financial support. This serves, first and foremost, the interest of the child, as financial support for the parents contributes to a safe and healthy environment for the child to grow up in. But it also mitigates the impact on the parents and especially the mother that are struck by a heavy financial burden that they did not expect. This conclusion has, in my view, been the decisive factor in all English (and German) decisions, the problem was that there is no suitable legal basis for a financial award without causing friction with questions of legal policy, especially the question of whether categorizing something as damage in a legal sense is morally offensive. It is not sufficient to base an award on social policy, without providing a sound legal concept that the award flows from. A statutory compensation scheme, however, is not bound to doctrinal reasoning.

The way forward is to accept that *Rees* is, at its core, a judicial compensation scheme serving purposes of social policy. It would be favourable to provide for the *Rees*-compensation in a piece of parliamentary legislation, where it belongs better. This would allow the courts to further develop the doctrine of autonomy in tort

law, without having to deal with the shackles of *Rees* and without having to sacrifice the support provided to the parents.

### C. CONCLUSION: LIFE AFTER REES

A few concluding remarks should be made. The discussion has shown that it is imperative to differentiate between different questions of policy. The courts have dealt with questions of legal policy, i.e. the sanctity of life, while aiming for a result that serves social policy, namely the financial support of the parents. This has led to incoherence and uncertainty in the law. Instead, the issue of social policy, should be dealt with by parliament. I argue that there is a strong case for supporting the parents. This, however, has to be kept separate from the legal questions. The question of infringement of autonomy, that the House of Lords stumbled upon in *Rees*, should be further developed by acknowledging a tort, structured as laid out above, that is actionable *per se*. *Rees* should no longer be regarded as authority in this regard.

## VI. THE NEXT CHAPTER: WRONGFUL SURVIVAL

Today, almost 20 years after *Rees*, there is a new challenge: wrongful survival. In these cases, damages are claimed because a life has been prolonged unnecessarily or against the patient's will. While there is no English decision on this matter to date, the according set of facts have also recently come before the courts in the US.<sup>103</sup> The personal decision to die and consciously reject life-prolonging measures is one of great present relevance, which is why wrongful survival has also been discussed in the media<sup>104</sup> and which is also why it is likely that this question will be brought to English courts.

These cases are an ideal test tube for the concepts discussed above. On the one hand, they raise similar issues of legal policy and legal concepts while on the other hand, they do not concern social policy to the same extent. There is no need

<sup>103</sup> *Doctors Hospital of Augusta LLC v Alicea* [2016] 299 Ga 315 (Supreme Court of Georgia). The Court held that the patients' decision to die is binding without, however, deciding on damages.

<sup>104</sup> See for example Paula Span, 'The Patients Were Saved. That's Why the Families Are Suing.' (*The New York Times*, 10 April 2017) <<https://www.nytimes.com/2017/04/10/health/wrongful-life-lawsuit-dnr.html>> (accessed 2 August 2020).



for basic financial support, from a policy point of view, for people whose lives have been prolonged.

### A. GERMANY

The BGH considered this new kind of claim in 2019, thirty-five years after the *rubella-case*. The case concerned a man who suffered from severe dementia. He had been unable to move unassisted since 2003 and had been unable to communicate since at least 2008. He had been artificially nourished since 2006 and died in 2011. His son brought a claim against the doctor responsible for the treatment. The claimant argued that the artificial nourishment had not been supported by medical necessity at least after 2010. He claimed damages for the pain suffered by his father, for his loss of autonomy and for the medical bills generated by the prolonged medical assistance.<sup>105</sup> The LG Munich I dismissed the claims, but the OLG Munich overturned this decision in part, awarding damages amounting to 40,000€ for the pain suffered.<sup>106</sup> The BGH allowed the defendant's appeal and dismissed the claimant's cross-appeal, dismissing all heads of damage.<sup>107</sup> The claim regarding medical bills was dismissed on the grounds of a principle of German contract law that is not relevant to the issues discussed here. I will only discuss the other two heads of damage.

#### (i) *Damages for Suffering*

The court began its discussion by referring to its decision in the *rubella-case*. After laying down the *ratio* of that case, the court stated that the difference of this new case is that the decision of life and death was made at the end of a human life. Whilst an unborn child does not have a legally acknowledged possibility to make a decision on its own life, the man in this case did.<sup>108</sup> However, the BGH applied the same principles as in the *rubella-case*. The BGH did not discuss the question of whether the continuation of the artificial nourishment constituted a breach of duty with regard to the medical situation of the patient but only because, just as in the *rubella-case*, there was no damage that could be claimed. The court held that even

<sup>105</sup> This claim, if it existed, would originally have been a claim of the patient. However, following his death, it would have been transferred to the son by way of universal succession as heir of the deceased (*Erbrechtliche Gesamtrechtsnachfolge*) according to s 1922 BGB.

<sup>106</sup> OLG Munich I U 454/17, FamRZ 2018, 723.

<sup>107</sup> BGH VI ZR 13/18, NJW 2019, 1741.

<sup>108</sup> See s 1901a BGB regarding patients' decrees (*Patientenverfügungen*). The English equivalent is discussed in the next section.

if the law acknowledges the individual right to regard one's own life as not worth preserving, a court cannot do so:

Even if the patient regards its own life as not worth living, the constitution prohibits any agent of the state including the judiciary to pass such a judgment on the life of the patient affected in concluding that this life is damage.

Auch wenn der Patient selbst sein Leben als lebensunwert erachten mag, verbietet die Verfassungsordnung aller staatlichen Gewalt einschließlich der Rechtsprechung ein solches Urteil über das Leben des betroffenen Patienten mit der Schlussfolgerung, dieses Leben sei ein Schaden.<sup>109</sup>

The court also briefly put forward the second argument known from the *rubella-case* and *McKay*, namely that there is no way to determine whether life with a disease is in any way worse than death.<sup>110</sup> This approach has been largely supported by academic writers before and after the decision.<sup>111</sup> In this regard, the decision is largely a rerun of the *rubella*-judgment.

(ii) *Damages for Loss of Autonomy*

The last head of damage was only briefly mentioned by the BGH, even though the court found the autonomy of the patient to be the distinguishing feature in this new case. The court held that it did not need to decide on the issue as there was no evidence that the patient wanted to die, unlike in wrongful conception cases where there is clear evidence that the parents did not want children.

This issue has therefore still not been decided in Germany. Similarly, academic commentary has so far only mentioned this question, but has not yet discussed it in detail.<sup>112</sup> Cases in which this claim could be pursued, however, are rare because claims based on a violation of autonomy would have to be brought under infringement personality rights (*Persönlichkeitsrechtsverletzung*) and such claims are generally not inherited by the legal successor.<sup>113</sup> Therefore, the claim would

<sup>109</sup> BGH VI ZR 13/18, NJW 2019, 1743.

<sup>110</sup> *ibid.*

<sup>111</sup> See *Ludyga* NZFam 2017, 595; *Prütting* ZfL 2018, 94. For a different opinion, see *Zimmermann* ZfL 2018, 104.

<sup>112</sup> See *Zimmermann* (n 111); *Spickhoff* NJW 2019, 1718, 1719.

<sup>113</sup> BGH VI ZR 246/12, NJW 2014, 2871.

have to be pursued by the patient during his or her lifetime and this poses some practical challenges.<sup>114</sup>

## B. ENGLAND AND WALES

So far, this kind of case has not been argued before English courts. However, looking at the issues they pose, they might well be the next challenge for English law in this area. In the following, I will apply the different concepts in English law to the issues raised by the German case.

### (i) *Damages for Suffering*

The first question an English court would have to answer is whether there is a cause of action for the pain and suffering brought on by prolonging an individual's life. In view of *McKay*, such a cause of action does not exist. Just as in *McKay*, there is no duty of care to stop life-prolonging measures based merely on medical indication. While the Supreme Court in *An NHS Trust v Y*<sup>115</sup> decided that life-prolonging measures can be withdrawn in cases of best-interest without obtaining a court order, this does not impose a duty, just like how the legal possibility to have an abortion does not impose a duty. The second argument accepted in *McKay* is also applicable. Damages for a prolonged life are just as incalculable as damages for being born at all. Therefore, an English court is highly likely to come to the same conclusion as the BGH and dismiss the claim.

### (ii) *Damages for Loss of Autonomy*

The challenge for English law lies in the second head of damage: damages for loss of autonomy. As laid out above, the BGH did not decide on this issue and it has not been adequately discussed in German literature. That is not surprising, as the BGH has so far kept the question of autonomy out of all cases of wrongful existence. In *Rees*, the House of Lords, however, set sail in these uncharted waters, making it necessary to elaborate on this point.

Under English law, the autonomy to refuse life-saving treatment has been implemented in Section 24–26 Mental Capacity Act 2005 (hereafter “the Act”). According to Section 24 of the Act, patients aged 18 and older can draw up an Advance Decision (AD) on lifesaving treatment. According to Section 26(1) of the Act, this decision is legally binding. A doctor can be held liable for violating an AD. This liability is only limited by Section 26(2) of the Act, providing that there is no liability where the person carrying out the treatment is satisfied that there is a valid and applicable AD. When the Act was passed into law, the Government had in

<sup>114</sup> cf *Bach* NJW 2019, 1915, 1917.

<sup>115</sup> [2018] UKSC 46, [2018] 3 WLR 751.

mind civil liability for battery and criminal liability for assault.<sup>116</sup> However, as there is no general limit to claims imposed by the Act, a claim for loss of autonomy after a violation of an AD can go forward, subject only to the limitation of Section 26(2) of the Act. The success of this claim, however, is dependent on which concept is applied, which will be shown in the following.

The first important issue to note is that by claiming loss of autonomy, the case of wrongful survival frees itself from the notion of the sanctity of life expressed in *McKay*. An unborn foetus does not have the autonomy to end his or her own life whereas a born human does. Therefore, if the law is to acknowledge the autonomy to die (as it has in the Act), this cannot logically violate the sanctity of human life. This aspect of *McKay* is not relevant for cases of wrongful survival.

The next step to moving this case closer to cases of wrongful conception, is to compare the type of autonomy. While the decision in *Rees* and most of the academic commentary have been limited to cases of wrongful conception, there is no reason not to give the same treatment to other areas of autonomy that are equally important and equally protected by the law. At the same time, the law cannot protect every type of autonomy. Yet, it is submitted that there can be no difference made between this case and *Rees*. The autonomy to choose death over a prolonged life is an achievement of modern legal thinking that steers clear of medical paternalism. As shown above it is also respected by statutory law. In my view, there is no justification for treating this case any different than wrongful conception.

An important question lies in the second limb of the *McKay* decision. As laid out above, the court rejected the claim on the basis that the damages could not be calculated, because the state that was to be contemplated was nonexistence. The same applies in this case if one was to regard the loss of autonomy as a regular head of damage under tort law. In this case, a court would have to ask what state of autonomy would have existed had the duty not been breached and the answer would be: no state of autonomy. Had the defendant complied with the duty of care, the claimant would be dead. Just as it is not possible to compare a state of suffering with death, it is not possible to compare a state of infringed autonomy with death. Consequently, following *McKay*, the claim would have to fail if the claimant claims loss of autonomy as a regular head of damage.

A different result is reached by applying the concept of loss of autonomy as a tort actionable *per se*. In this case, it is not necessary to compare the different situations, as nominal damages would be available. Section 26(2) of the Act does not change the elements of this tort: it has to be intentional regardless. Applying this concept, a patient who is kept alive by a doctor who refused to comply with an

<sup>116</sup> Explanatory Note to the Mental Capacity Act 2005, para 91.

AD – while being well aware of the AD – would be entitled to nominal damages for infringement of autonomy. Nominal damages might not seem sufficient to acknowledge the extent of the legal wrong that was committed. However, it is the only remedy that is available in English law, as for the reasons above, compensatory damages are not available even if one was to acknowledge loss of autonomy as a regular head of damage. Unless the Supreme Court changes its opinion on vindicatory damages, no other remedy is available.<sup>117</sup> I believe this to be a convincing approach that achieves a reasonable result. Should an English court be presented with this type of case, it is advised that this approach be followed.

## VII. CONCLUSION: WRONGFUL EXISTENCE – A MATTER OF AUTONOMY?

A comparative analysis of wrongful existence in Germany and England highlights the different ways in which these cases can be approached. Both jurisdictions are united in their view of the comparatively 'simple' cases of wrongful life: simple because the notion of autonomy is not in question in these cases. Cases of wrongful conception, however, raise both questions of financial loss and loss of autonomy. The different causes of actions and the views on the financial loss taken by the House of Lords and the BGH have forced English and German law to go separate ways. The comparatively modest approach of the BGH – to decide wrongful conception and wrongful survival based on the existing legal concepts and without discussing issues of autonomy – has led to decisions that offer a degree of certainty. However, as a result of this approach, the BGH has (arguably consciously) neglected the concept of loss of autonomy, and it is yet to be explored in German law. This is especially relevant as in cases of wrongful survival, as has been shown, different concepts of loss of autonomy might lead to completely different outcomes. English law has set foot in this territory following *Rees*. However, as laid out above, *Rees* is not the suitable starting point and loss of autonomy as regular damage is not the right concept for solving these cases. This article has instead proposed a new tort that is actionable *per se*. Should an English court be confronted with a case of wrongful survival, it is submitted that it should apply this new tort. Such a decision could be the cornerstone of a new area of tort law and will have implications beyond England and Wales, maybe even for Germany.

<sup>117</sup> This does not seem likely, as the Supreme Court has unanimously continued to follow this approach, see *R (on the application of O) v Secretary of the State for the Home Department* [2016] UKSC 19, [2016] 1 WLR 1717.